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OFFICE OF PETITIONS

In re Application of :
Naylor et al. :
Application No. 10/017,273 : ON PETITION
Filed: 12 December, 2001 :
Attorney Docket No. PC22013AADO :

This is a decision on the petition filed on 29 May, 2002, which is treated as a petition under 37 CFR 1.53 requesting that the above-identified application be accorded a filing date of 12 December, 2001, with Pages 123 and 124 of the specification as a part of the original disclosure.

The petition is dismissed.

On 12 December, 2001, the application was filed.

On 26 March, 2002, the Office of Initial Patent Examination (OIPE) mailed a "Notice" stating, *inter alia*, that the application had been accorded a filing date of 12 December, 2001, but that Pages 123 and 124 of the specification (description and claims) appeared to have been omitted from the application. A two (2) month period for reply was set.

In response, on 29 May, 2002 (certificate of mailing date 24 May, 2002), the present petition was filed. Petitioners argue that Pages 123 and 124 were present among the application papers filed on 12 December, 2001. In support, petitioners have submitted a declaration by counsel's employee, Sherry L. Jenkins, stating that she "personally verified" that "each and every page was present" before the application was filed in the USPTO on 12 December, 2001. Petitioners request that the application be accorded a filing date of 12 December, 2001, with Pages 123 and 124 as a part of the original disclosure.

The arguments have been considered, but are not persuasive. The U.S. Patent and Trademark Office (Office) file is the official record of the papers originally filed in this application. A review of the papers originally filed reveals that Pages 1-122 and 125-140 of specification, including claims, and abstract were received on 12 December, 2001. No Pages 123 and 124 were filed on 12 December, 2001, since no such pages are present among the application papers received on that date. An applicant alleging that a paper was filed in the Office and later misplaced has the burden of proving the allegation by a preponderance of the evidence. The fact that petitioner believes the page was among the papers he included in the application is not more persuasive than the actual papers shown to have been received by the official file. In this regard, Ms. Jenkins' declaration that she verified that each and every page was present prior to the filing of the application on 12 December, 2001, is not more persuasive than the contents of the official USPTO file.

It is noted that the USPTO has a long-established and well publicized practice for *prima facie* establishing the date of receipt of correspondence that has either been mailed or otherwise delivered to the PTO, and is asserted to have been subsequently misplaced: the itemized postcard receipt practice of section 503 of the Manual of Patent Examining Procedure (MPEP).¹ This practice requires that any paper(s) for which a receipt is desired be filed in the USPTO with a self-addressed postcard identifying the paper(s). A postcard receipt which itemizes and properly identifies the paper(s) which is being filed serves as *prima facie* evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO.

Where the records of the Office (e.g. the file of the application) contain any document(s) or fee(s) corresponding to the contents of the correspondence at issue, the Office will rely upon its official record of the contents of such correspondence in the absence of convincing evidence (e.g. a postcard receipt under MPEP 503 containing specific itemization of the document(s) or fee(s) purported to have been filed with the correspondence at issue) that the Office received and misplaced any document(s) or fee(s) that is not among the official records of the Office. If a new application is being filed, all parts of the application

¹The public was afforded a "reminder" of the then extent post card receipt practice at 857 *Off. Gaz. Pat. Off.* 667 (O.G.) (Nov. 21, 1968). This specific notice is usually repeated annually, in a January "Consolidated Listing" section of the O.G. that contains important O.G. notices of continuing relevance.

being submitted should be separately listed on the postcard (e.g. the number of pages of specification (including written description, claims and abstract) number of claims, number of sheets of drawings, number of pages of oath/declaration. The postcard receipt will not serve as *prima facie* evidence of receipt of any item which is not adequately itemized on the postcard.²

Since Pages 123 and 124 were not a part of the papers filed on 12 December, 2001, the application cannot be accorded the 12 December, 2001, filing date with these pages as a part of the original disclosure of this application.

As this petition was not due to an error on the part of the USPTO, the petition fee will not be refunded.

The application will be processed and examined using only the application papers present on filing on 12 December, 2001. The copy of Pages 123 and 124 and the other application papers supplied on 29 May, 2002, will not be used for processing or examination, but will be retained in the application file.

The application is being forwarded to the Office of Initial Patent Examination for further processing with a filing date of 12 December, 2001, using only the application papers filed on that date.

Telephone inquiries concerning this matter may be directed to the undersigned at (703)308-6918.



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²MPEP 503.